Wilayah Beauty Gems Sdn Bhd v Arab Malaysian Assurance Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-267 OF 1995
ZAINUN ALI J
13 JUNE 2002

Insurance — *Warranty — Interpretation of warranty — Insured issued warranty that armed guard would be on duty at all times — Guard in possession of loaded shot gun — Loaded shot gun kept in guard room while guard stood at front entrance of outlet — Whether guard 'armed' within the meaning of the warranty — Whether sufficient that guard armed within the meaning of 'possession' of arms*

Words and Phrases — *'armed' — Jewellers Block Policy*

The plaintiff jewellers obtained a Jewellers Block Policy pursuant to which the defendant insurers agreed to insure the plaintiff's stock, merchandise and bank notes used in the conduct of the plaintiff's business against loss or damage subject to the terms, conditions and limitations contained in the policy. The policy was subject, inter alia, to a warranty by the plaintiff that there would be at least one armed guard on duty at all times. A robbery took place at the plaintiff's premises, resulting in the plaintiff suffering loss and damage. On the day of the robbery, the security guard arrived for duty and waited outside the premises. The supervisor arrived and handed him the entrance door keys. The guard opened the premises before going in, followed by the supervisor and another shop staff who just arrived. The guard then relocked the premises and passed the keys to the supervisor. The guard entered the guardroom to switch on the shop lights and to load the pump gun. After he loaded the gun, he came out of the room, leaving the gun in the room, and stood near the entrance to await the arrival of other shop staff. He unlocked the entrance door to allow the shop staff to enter as and when they arrived. Each time after letting the staff in he relocked the door. All this time, his pump gun was left in the room. The plaintiff claimed a declaration that the defendant was liable under the insurance policy. The plaintiff's case rested on the construction of the word 'armed', which according to the Collins English Dictionary means to be equipped with or supported by arms, armour, etc. The plaintiff thus contended that at the time of the robbery the security guard was in possession of a gun, which he was prepared to use. The defendant contended that the security guard was not 'armed' within the meaning of the policy, which meant that they were entitled to rely on breach of warranty to repudiate liability under the said policy. Owing to the nature of the plaintiff's business as retailers of gold and jewellery, the defendant argued that strict and literal compliance had to be imposed on the warranty.

Held, dismissing the claim:

(1) The terms 'warranty' and 'condition' in the context of an insurance contract had acquired a meaning peculiar only to

insurance law. A warranty in a policy of insurance was a condition or a contingency, and unless that be performed, there is no contract. It was immaterial for what purpose a warranty was introduced, but having been inserted, the contract does not exist unless it be literally complied with. Thus a warranty must be literally complied with, for otherwise the contract of insurance is deemed non-existent (see p 128C–E); *De Hahn v Hartley* (1786) 1 Term Rep 343 and 346 and *CTN Cash & Life Assurance Corporation Plc* (1989) 1 L1 LR 299 followed.

(2) To be armed within the meaning of the policy means to be in actual physical possession of the said pump gun. In the present case, the fact that the pump gun was in the guardroom and the security guard was in the vicinity and could retrieve it for use at any time, could not be construed in law and in fact as being 'armed' under the terms of the said policy (see p 129B).

(3) The contra proferentum rule was not applicable to this case since the words 'armed guard on duty' contained in the said policy is clear. It would be repugnant to the meaning of the term, if the security guard was deemed to be armed even if he had loaded the gun and left it somewhere else. Surely this could not have been the intention of the policy, bearing in mind commercial expedience and the nature of business carried on by the plaintiff (see p 129C–D).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat penjual intan berlian, telah mendapatkan suatu Polisi Peniaga Intan Berlian di mana defendan, sebuah syarikat insuran, telah menjamin stok, barangan dan wang kertas plaintif yang digunakan dalam urusan perniagaan terhadap kehilangan atau kerugian tertakluk kepada terma, syarat serta penghadan yang terkandung dalam polisi tersebut. Polisi tersebut tertakluk, antara lain, kepada waranti oleh pihak plaintif bahawa sekurang-kurangnya seorang pegawai keselamatan bersenjata api akan bertugas pada setiap masa. Satu rompakan telah berlaku di premis plaintif, mengakibatkan plaintif mengalami kehilangan dan kerugian. Pada hari rompakan tersebut, pegawai keselamatan tersebut hadir untuk bertugas dan menunggu di luar premis tersebut. Penyelia kedai itu telah hadir dan memberikan kepadanya kunci kepada premis tersebut. Pegawai keselamatan telah membuka premis lalu memasuki premis tersebut, diikuti penyelia serta seorang pekerja yang baru tiba. Pegawai keselamatan kemudian telah menguncikan semula premis dan memberikan kunci kepada penyelia. Pegawai keselamatan telah memasuki bilik pegawai keselamatan untuk menghidupkan lampu kedai dan mengisi peluru pada senapang. Selepas mengisi senapang dengan peluru, ia keluar dari bilik tersebut, meninggalkan senapang dalam bilik tersebut, dan berdiri berhampiran pintu masuk menunggu ketibaan pekerja kedai yang lain. Ia telah membuka kunci pintu masuk

bagi membenarkan pekerja kedai masuk sebaik sahaja mereka tiba. Pada setiap kali selepas pekerja dibenarkan masuk ia telah menguncikan pintu. Pada sepanjang masa ini, senapangnya ditinggalkan di dalam bilik pegawai keselamatan. Plaintif menuntut deklarasi bahawa defendan bertanggungjawab dibawah polisi insuran. Kes plaintif berasaskan pembentukan perkataan 'bersenjata api', yang menurut Kamus Inggeris Collins bermaksud memiliki atau disokong dengan senjata api, perisai, dll. Maka plaintif mendakwa pada masa rompakan tersebut pegawai keselamatan memiliki senjata api yang ia bersedia menggunakan. Defendan pula mendakwa pegawai keselamatan tidak 'bersenjata api' mengikut peruntukan polisi tersebut, yang membolehkan mereka berpegang kepada kemungkiran waranti lalu menolak liabiliti dibawah polisi tersebut. Memandangkan jenis perniagaan plaintif sebagai peniaga emas dan intan berlian, defendan mendakwa waranti tersebut perlu dipatuhi secara tegas dan literal.

Diputuskan, menolak tuntutan tersebut:

(1) Terma 'waranti' dan 'syarat' dalam konteks suatu kontrak insuran telah mendapat maksud yang aneh kepada undang-undang insuran sahaja. Sesuatu waranti dalam polisi insuran adalah suatu syarat atau kontingensi, dan selagi ianya tidak dilakukan, maka tiada kontrak yang wujud. Adalah tidak material sebab-sebab mengapa waranti dikenakan, tetapi sebaik sahaja ia dimasukkan, maka kontrak tidak wujud selagi ia dipatuhi secara literal. Jadi sesuatu waranti perlu diikuti secara literal, jika tidak kontrak insuran dianggap tidak wujud (lihat ms 128C–E); *De Hahn v Hartley* (1786) 1 Term Rep 343 and 346 dan *CTN Cash & Life Assurance Corporation Plc* (1989) 1 L1LR 299 diikut.

(2) Bersenjata api dibawah polisi tersebut bermaksud memegang senapang tersebut. Dalam kes ini, fakta bahawa senapang berada di dalam bilik pegawai keselamatan dan pegawai keselamatan berada di kawasan berhampiran dan dapat mengambilnya pada bila-bila masa, tidak dapat ditakrifkan dalam undang-undang atau secara fakta sebagai 'bersenjata api' di bawah terms polisi tersebut (lihat ms 129B).

(3) Prinsip contra proferentum tidak beraplikasi pada kes ini memandangkan yang perkataan 'pegawai keselamatan bersenjata api bertugas' yang terkandung dalam polisi tersebut adalah jelas. Adalah bertentangan maksud terma tersebut sekiranya pegawai keselamatan dianggap bersenjata api walaupun ia telah mengisi peluru kepada senapang dan meninggalkannya di tempat lain. Semestinya ini bukannya kehendak polisi tersebut, dalam menimbangkan keperluan komersial dan jenis perniagaan yang dijalankan plaintif (lihat ms 129C–D).]

[*Editorial Note*: The plaintiffs have appealed to the Court of Appeal vide Civil Appeal No W–02–511 of 2002.]

Notes

For cases on warranties generally, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) para 320.

Cases referred to

CTN Cash & Life Assurance Corporation Plc (1989) 1 L1 LR 299 (refd)
De Hahn v Hartley (1786) 1 Term Rep 343 (refd)
New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading [1992] 1 MLJ 185 (refd)
Sullivan v Earl of Caithness [1976] 1 All ER 844 (refd)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Thiru Mangai Krishnan (*Othman Hashim & Co*) for th plaintiff.
T Sagadevan (*Shearn Delamore & Co*) for the defendant.

Zainun Ali J: The plaintiff who is a jeweller, obtained a Jewellers Block Policy ('the said policy') for the period of 18 August 1994 and 17 August 1995 (inclusive both days).

Pursuant to the said policy, the defendant had agreed to insure the plaintiff's stock and merchandise used in the conduct of the plaintiff's business and bank notes against loss or damage as specified in the master policy, up to the limit of RM1m, subject to the terms, conditions and limitations contained in the said policy. The declared total value at risk is RM3.5m.

Pursuant to policy endorsement No AME/201/94 dated 16 August 1994, the said policy is subject to the following warranty:

> It is warranted that there is at least one armed guard on duty during business hours (including opening and closing of shop).

On the 27 November 1994, an armed robbery took place at the plaintiff's premises, resulting in the plaintiff suffering loss and damage in the sum of RM996,282,45.

It was agreed between the parties that pursuant to the co-insurance clause contained in the said policy, the quantum is RM747,211.84 (inclusive of interest).

It is the plaintiff's claim that on 27 November 1994 whilst the policy was operative, the plaintiff was robbed by armed robbers at about 10.15am, when the plaintiff's premise was about to be opened for business.

The plaintiff claimed that there was an armed guard at that time. Thus, the plaintiff's claim is for a declaration that the defendant is liable by virtue of the insurance policy issued by them and plaintiff is entitled to claim:

(a) amount totalling RM996,282.45;
(b) interest of the above amount;
(c) cost; and
(d) other reliefs.

The defendant in its defence averred that the defendant is not liable to satisfy the plaintiff's demand or any part thereof by reason of inter alia, breach of warranty endorsement No AME/201/94 stated above.

The defendant averred that they are not liable to satisfy the claim of the plaintiff because the alleged loss suffered by the plaintiff did not occur during normal business hours of the plaintiff. The defendant further averred that the plaintiff is in breach of policy warranty in failing to ensure the presence of at least one armed guard on duty at the material time.

In short, the defendant repudiated liability on the basis that at the time of the robbery the security guard was not armed.

The issue in this case is whether the security guard was 'armed' at the time of the robbery and whether it falls within the said warranty.

It would be useful to look at the exact factual matrix to determine this. I can do no better then to reproduce excerpts from the statement of the security guard.

He said:

> On 27 November 1994 at about 8.45am I arrived for normal duty at Kelvin Gems. Upon my arrival, none of the shop staff had arrived yet and I waited outside the premises. At about 9.00 am, the supervisor of Kelvin Gems arrived and I opened the premises. He handed me the entrance door keys and I opened the premises before going in first followed by the Supervisor and another shop staff who arrived at the time.
>
> After we entered the shop, I relocked the premises and passed the keys to the supervisor. I then entered the guardroom to switch on the shop lights and load the gun which is left in the guard room. The pump gun contains three bullets. After I loaded the gun, I came out of the room leaving the gun in the room to await the arrival of other shop staff near the entrance.
>
> On 27 November 1994, I unlocked the entrance door to allow the shop staff to enter as and when they arrived. Each time after letting the staff in I relocked the door. At the time, my pump gun was left in the room.
>
> On 27 November after the tourists arrived at about 10.00 am. I opened the entrance door to let them in. Although it was not yet the normal opening time of 10.30am. I could not relock the door as other members of the group were still entering the shop. I then went to the toilet I returned to the entrance and I noticed that there were other Japanese still entering the shop.

Thus from the above statement, it is clear that:

(a) the guardroom is inside the insured premises.

(b) the security guard had loaded the pump gun and left it in the guardroom;

(c) the security guard had thereafter stationed himself at the entrance of the premise carrying out his duty and the *pump gun was left* in the *guardroom*, inside the premises (my emphasis).

(d) as and when the staff arrived, the security guard let there into the premises and relocks the entrance door;

(e) on 22 November 1994, he had unlocked the entrance door to allow some customers (tourists) into the premises and went off to the toilet unarmed as the pump gun was still in the guardroom inside the premises;

(f) After visiting the toilet, the security guard returned to the entrance and he noticed that there were other Japanese customers still entering the shop. He was still unarmed.

The plaintiff's case

Since the linchpin of his case rests on the construction of the word 'armed', the plaintiff took the *Collins English Dictionary* meaning among others, to lend credence to its submission that the security guard was armed.

According to *Collins English Dictionary*, 'armed' means to be equipped with or supported by arms, armour, etc.

The plaintiff contends that the security guard was equipped with arms that is, the security guard at the time of the robbery was in possession of a gun and which was prepared for use.

The plaintiff referred to the case of *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 for the purpose of showing possession — where 'the word 'possession' implies a physical capacity to deal with the thing as one likes to the exclusion of everyone and a determination to exercise that physical power on one's own behalf. It implies dominion and consciousness in the mind of the person having 'possession'; that he not only has such dominion, but also that he can exercise it.

The plaintiff also cited the case of *Sullivan v Earl of Caithness* [1976] 1 All ER 844 which held that:

> Since D was at all material times the owner of the firearms, and could obtain them from his mother's flat at any time he wanted them, the firearms were 'in his possession' ... even though he did not have physical custody of them.

The plaintiff contends that in order to be in possession of a thing, the person having possession must have the power to deal with it to the exclusion of others and the person having possession of a thing need not have physical custody of it.

The plaintiff contends by virtue of this fact and the cases cited, that the security guard was clearly in possession of a shot gun at the time of the time of the robbery and therefore he was 'armed' within the meaning of the said warranty and condition and that the said policy is not breached.

The plaintiff also contends that in the absence of the definition of what constitutes the word 'armed' in the said Policy, the contra proferentum rule is applied in construing the meaning of 'armed' within the ambit of the said policy.

Defendant's case

It is the defendant's case that the nature of the plaintiff's business, ie retailers of gold and jewellery, demands that strict and literal compliance be imposed on the warranty.

The defendant contends that the security guard was not 'armed' within the meaning of the policy, which means that they are entitled to rely on breach of warranty to repudiate liability under the said policy.

The legal affect of a warranty and a breach thereof was considered in the case of *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading* [1992] 1 MLJ 185, where a passage from the *Law of Insurance* by Associate Professor Poh Chu Chai was quoted that (at p 196):

> The terms 'warranty' and 'condition' in the context of on insurance contract have acquired a meaning peculiar only to insurance law ...

In *De Hahn v Hartley* (1786) 1 Term Rep 343, Lord Mansfield described a warranty as follows (at pp 345–346):

> A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but being inserted, the contract does not exist unless it be literally complied with.

The court takes the view, following the above passage that a warranty must be literally complied with, for otherwise the contract of insurance is deemed non-existent.

This view is fortified by the decision of the court in *CTN Cash & Life Assurance Corporation Plc* (1989) 1 L1 LR 299.

Briefly, in the said case, the defendants had issued an Insurance (Burglary and money) policy to the plaintiff which contained the following warranty:

> It is warranted that the secure cash kiosk shall be attended and locked at all times during business hours.

On 27 November 1986 while the business doors of the warehouse were still open, between 7.40 and 7.45pm, the plaintiff's employee, Mrs Fischer decided to get the till key from the office which was above the kiosk in order to cash up. As she came down the stairs to return to the cash kiosk which she had locked, somebody raised an enquiry as to the price of some whisky.

Mrs Fisher and Mr Nattall, another employee, were coming down one of the aisles of the cash and carry after investigating the price, when Mr Natall was assaulted by masked men and forced to the ground and Mrs Fisher was tied up and her keys taken away. The masked men got away with goods worth tidy sum.

The plaintiff's claimed under its policy but the defendants contended that they were not liable as the plaintiff had not complied with its obligation that the kiosk was to be attended at all times during business hours.

A It was held by the court, inter alia, that the kiosks would not be regarded as attended to if the person who was normally in the kiosk remained in its near vicinity and the plaintiff's kiosk was unattended at the material time.

Thus in the cash and carry case above, the court had construed the term 'attended' quite literally and held that the cash kiosk was unattended although Mrs Fisher was in the vicinity.

B

Likewise, in the present case, the security guard was required to be armed whilst on duty ie in physical possession of the pump gun. The fact that the pump gun was in the guardroom and the security guard was in the vicinity and could retrieve it for use at any time, cannot be construed in law and in fact as being 'armed' under the terms of the said policy.

C This court finds that the authorities referred to by the plaintiff on the definition of possession are not relevant to the present case.

This court also finds that the contra proferentum rule is not applicable to this case since the words 'armed guard on duty' contained in the said policy is clear.

D It would be repugnant to the meaning of the term, if the security guard is deemed to be armed even if he had loaded the gun and left it somewhere else. Surely, this cannot be the intention of the policy, bearing in mind commercial expedience and the nature of business carried on by the plaintiff.

E Thus, this court finds that to be armed within the meaning of the policy means to be in actual physical possession of the said pump gun.

Thus, in the circumstances, the plaintiff's claim is dismissed with costs.

Claim dismissed with costs.

F Reported by Sivapragasam Kumaran

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